

In  
**The Supreme Court**  
of the United States

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October Term, 1916

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NORTHERN PACIFIC RAILWAY COMPANY, a  
corporation, and THE FARMERS' LOAN  
AND TRUST COMPANY, a corporation,  
as Trustee,  
*Petitioners,*

vs.

E. W. McCOMAS,  
*Respondent.*

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**Petition for Writ of Certiorari**

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To the Honorable the Chief Justice and Associate  
Justices of the Supreme Court of the United  
States:

Now come your petitioners, Northern Pacific  
Railway Company, a corporation, and The Farmers'  
Loan and Trust Company, a corporation, and make  
this their petition for a writ of *certiorari* to the Su-  
preme Court of the State of Oregon and in support  
thereof respectfully say:

This suit originated in the Circuit Court of the State of Oregon for Umatilla County. Its object is to quiet title to certain lands located within the place limits of the grant to the Northern Pacific Railroad Company (Act of July 2, 1864, 13 Stats. at Large, 365.) There was a decree for plaintiff (respondent here) which was first affirmed and subsequently on rehearing modified by the Supreme Court of the State of Oregon; pursuant thereto a decree was rendered by the Supreme Court of Oregon on January 30, 1917. (Record, p. 110.) Said decree is final and the Supreme Court is the highest court of the State of Oregon in which a decision in the suit can be had.

The decision of the Supreme Court of the State of Oregon denies a title, right, and privilege granted your petitioners by the Act of Congress approved July 2, 1864, (13 Stats. at Large, 365) in this:

Although the lands in dispute are within the place limits of the grant made to the Northern Pacific Railroad Company, they were excepted from the grant because at the time of definite location of the railroad they were not free from "preemption or other claims or rights." At that time (June 29, 1883,) there was of record in the Land Department of the United States a claim to the lands filed November 23, 1872, by the State of Oregon, under the Swamp Land Acts of 1850 and 1860 (9 Stats. at Large, 519; 12 Stats. at Large, 3). (Record, p. 31.) Nevertheless the lands (with the exception of two

tracts) were patented to the Northern Pacific Railway Company, the successor of the grantee, which company assuming the patents to have been inadvertently issued reconveyed the lands to the United States after the beginning of this suit. (Record, pp. 20-23.) Under the provisions of Section 3 of the Granting Act (13 Stats. at Large, 365) the Railway Company filed mineral indemnity selections covering each tract; one of those has gone to patent and the others are *sub judice* in the Land Department of the United States. (Record, pp. 20-23.)

The decree of the Circuit Court denied that the swamp land claim of the State of Oregon was a "claim" sufficient under the granting act to except the lands from its operation, and held that they passed to the Railroad Company upon definite location in 1883; and the right of plaintiff (respondent here) to the lands was upheld because of subsequent adverse possession. (Record, pp. 15, 40.)

The decision of the Supreme Court of Oregon held that though the lands *were* excepted from the grant by the State swamp claim yet the legal title to the lands became vested by virtue of the patents and that the reconveyances by the Railway Company were ineffectual to revest the United States with the title since the record failed to show an acceptance of the deeds by the United States; and that this title was defeated by the adverse holding of respondent's grantors. (Record, p. 106.) In this the court erred since the lands were not patented at the time of the

adverse possession; all of the patents to the Railway Company having been issued less than ten years prior to the commencement of this suit. (Record, p. 33.)

These decisions incorrectly construe the Act of July 2, 1864, (13 Stats. at Large) and through such erroneous construction uphold the claim of respondent based solely on occupancy of public land and deprive petitioners of the right given by Section 3 of said Act to select for mineral losses lands within the place limits which clearly were public lands at the time of filing the selection lists.

Petitioners believe that these decisions of the Supreme Court of the State of Oregon and the decree entered pursuant thereto are erroneous and that this Honorable Court should require the cause to be certified to it for its review and determination in conformity with the provisions of the Act of Congress in such cases made and provided.

There is submitted herewith a copy of the entire record in the cause in the Supreme Court of the State of Oregon certified to be a correct copy by the clerk of said court; said copy is marked "Exhibit A" and it includes a transcript of all of the proceedings had in said cause both in the trial court and in the Supreme Court of Oregon.

Wherefore your petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this court directed to the Supreme Court of the State of Oregon commanding the said

court to certify and send to this court on a day certain to be therein designated a full and complete transcript of the record of all proceedings of the said Supreme Court of the State of Oregon in the said cause therein entitled: *E. W. McComas, Respondent v. Northern Pacific Railway Company, a corporation, The Farmers' Loan and Trust Company, a corporation, Trustee, Appellants, and other persons unknown to plaintiff, Defendants*, to the end that said cause may be reviewed and determined by this court as provided by Section 237 of the Judicial Code of the United States as amended by the Act of Congress approved September 6, 1916; or that your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said Act, and that the said decree entered as aforesaid in conformity with said decisions of the Supreme Court of the State of Oregon in said cause and every part thereof may be reversed by this Honorable Court.

And your petitioners will ever pray.

CHARLES H. CAREY,

JAMES B. KERR,

CHARLES A. HART,

Counsel.

State of Oregon, County of Multnomah, ss.

Charles A. Hart, being duly sworn, says: that he is one of the counsel for Northern Pacific Railway Company and The Farmers' Loan and Trust Company, petitioners; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

CHARLES A. HART.

Subscribed and sworn to before me this 20th day of March, 1917.

(Seal)

OMAR C. SPENCER,  
Notary Public for Oregon.

My commission expires October 19, 1919.

## Brief in Support of Petition for Writ of Certiorari

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### STATEMENT OF THE CASE.

This is a suit to quiet title to certain lands in Umatilla County, Oregon, located within the place limits of the grant to the Northern Pacific Railroad Company (Act of July 2, 1864, 13 Stats. at Large, 365). The respondent McComas was plaintiff in the trial court. His claim to the lands was based upon the theory that they became vested in the Railroad Company at the time the railway was definitely located in 1883; and that his possession under color of title based upon a conveyance from the State of Oregon for ten years after 1892 gave him the undisputed right to the lands. (Record, pp. 31, 32.)

The defendants insisted that the lands were excluded from the grant of July 2, 1864, since at the time of definite location of the railway in 1883, there was of record a swamp land list filed by the State of Oregon, November 23, 1872, under the Swamp Land Acts of 1850 and 1860 (9 Stats. at Large, 519, 12 Stats. at Large, 3). (Record, pp. 31, 32.) With the exception of two of the tracts involved, the land was in fact patented to the Railway Company, successor of the Railroad Company, in 1906, 1907, and 1909, (Record, p. 33), but the Railway Company assuming that the patents had

been inadvertently issued reconveyed the lands to the United States after the beginning of this suit. (Record, pp. 20-23.) Thereafter under the mineral indemnity provisions of the Granting Act (13 Stats. at Large, 365) petitioner Railway Company filed selection lists covering the lands. One of these has gone to patent and the others are *sub judice* in the Land Department of the United States. The two tracts which were not patented have also been selected under the mineral indemnity section of the grant. The status of each of the tracts in dispute is as follows (Record, pp. 20-23) :

*Lot 2, Section 5, Township 5 North, Range 30 East,*

Included in State's swamp land list of November 23, 1872, but claim never passed on by Department; conveyed by State to respondent's predecessor August 10, 1892; patented to Railway Company May 4, 1909; reconveyed by Railway Company to United States December 4, 1912; included in mineral indemnity selection list No. 107 filed January 17, 1913, and claim thus made not yet disposed of by Department.

*Lot 4, Section 5, Township 5 North, Range 30 East,*

Included in swamp land list filed by State of Oregon November 23, 1872, and conveyed by State to respondent's predecessor; swamp land claim of State thereafter rejected by the Department; included in mineral indemnity selection list No. 101 filed by Railway Company and approved October 11, 1912, but not yet patented.



*North Half of Northwest Quarter of Section 7,  
Township 5 North, Range 30 East,*

Included in swamp land list filed by State of Oregon in 1872 and conveyed by the State to respondent's predecessor August 10, 1892. Swamp land claim of the State of Oregon thereafter disallowed by the Department; included in mineral indemnity selection list No. 67, filed by Railway Company and approved July 23, 1908, but patent not yet issued.

*North Half of Northeast Quarter of Section 7,  
Township 5 North, Range 30 East. (Also  
described as Lots 1 and 2.)*

Included in swamp land list filed by the State of Oregon November 23, 1872, and conveyed by the State to respondent's predecessor August 10, 1892; swamp land claim never adjusted. Patented to Railway Company December 31, 1907; reconveyed by Railway Company to United States December 4, 1912, included in mineral indemnity selection list filed by Railway Company January 17, 1913. Claim based thereon not yet adjusted.

*Northeast Quarter of Southwest Quarter of  
Section 7, Township 5 North, Range 30 East.*

Included in swamp land list of the State of Oregon of November 23, 1872, and conveyed by the State to respondent's predecessor; claim of the State rejected March 15, 1895; patented to the Railway Company June 8, 1906; reconveyed by Railway Company to United States December 4, 1912, included in mineral indemnity selection list filed by Railway Company and approved January 17, 1913. Patent issued to the Railway Company upon the selection so made May 25, 1914.

Upon this record the question presented to the trial court was whether or not the lands were excepted from the operation of the railroad grant of July 2, 1864, because at the time the railroad was definitely located in 1883, there was of record against them the swamp land claim of the State of Oregon. If the State's swamp claim did so except them, they remained public lands at least to the time of the patents; and the possession of respondent's predecessors would be ineffective. Petitioners did not seek affirmative relief in the trial court except as to the one tract repatented upon the mineral indemnity selection lists; its claim as to the other lands being before the Department and not within the trial court's jurisdiction.

The trial court concluded that the State's swamp land list was not a "claim" sufficient to take the lands out of the operation of the grant at the time of the definite location in 1883. (Record, p. 15.) This resulted in the decision that from the time of definite location the lands were railroad property and subject to rights acquired by adverse possession; and a decree for plaintiff (respondent here) was entered. (Record, p. 40.)

The first decision of the Oregon Supreme Court conceding the error of this conclusion nevertheless affirmed the decree upon the following grounds: Assuming that the mineral indemnity selections of the Railway Company had gone to patent and that the claims of petitioners based upon such patents

were before the court, it held that under the Act of July 2, 1864, mineral losses could not be made up from lands in the place limits of the grant and therefore that the selections of the Railway Company created no rights; and that as between these claims and the adverse possession claim of respondent, the latter should prevail. (Record, p. 89.)

Upon an application for rehearing which explained the error in the assumption that petitioner's mineral indemnity selection rights were before the court for construction (Record, p. 97), the decree was modified so as to exclude the two tracts which were never patented and as to which there is pending in the Land Department unadjusted selection lists of the Railway Company; as to these tracts an injunction was allowed against interference with respondent's possessory rights until action by the Land Department. (Record, p. 106.) As to the remaining tracts (those which were patented and subsequently reconveyed to the United States) the trial court's decree was affirmed but on the ground that the patenting of the lands to the Railway Company conveyed the legal title which title was defeated by the adverse possession of respondent and his predecessors; and the reconveyances to the United States were said to have been ineffectual because the record failed to show that the United States had accepted the deeds. (Record, p. 106.)

The final decree entered pursuant to the second decision of the Oregon Supreme Court confirms

respondent's title to the tracts last referred to and denies the right of petitioner Northern Pacific Railway Company to acquire them under the mineral indemnity clause of the Act of July 2, 1864; and as to the other two tracts enjoins interference with the possession of respondent until the Land Department shall have acted upon the Railway Company's mineral indemnity claims. (Record, p. 110.)

**ARGUMENT.**

It is assumed that the relief here sought is not available to petitioners unless clearly and unmistakably rights granted by a law of the United States have been denied by the decision of the Oregon Supreme Court. We shall undertake, therefore, to point out the plain error of the decision and its denial of petitioners' rights under the Act of July 2, 1864.

The question upon which this case originally turned was whether or not the lands in dispute were excepted from the grant of July 2, 1864, because at the time the railway was definitely located there was of record in the Land Department the swamp land claim of the State of Oregon. The trial court decided that the State's swamp land list was not a "claim" under the terms of the Act and that the lands passed to the Northern Pacific Railroad Company whose rights were later divested by the adverse possession of respondent's grantors. (Record, p. 15.) The Supreme Court of the State although affirming the trial court's decree declined to follow the reasoning on which it was based and conceded that the swamp land claim of the State did operate to exclude the lands in dispute from the grant to the Railroad Company. (Record, p. 92.) On this question, therefore, we shall content ourselves with a reference merely to the decisions of this court establishing beyond question (as we believe) that a claim such as that which had been made to these

lands by the State of Oregon is a "claim" sufficient to prevent the grant from attaching at the time of definite location of the railway.

*Whitney vs. Taylor*, 158 U. S. 85, discusses the effect of an existing claim in the following language:

"It was not the intention of Congress to open a controversy between the claimant and the Railroad Company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant in respect to which the Railroad Company was not permitted to be heard."

Applying the rule thus stated this court held that applications to purchase lands as mineral (although the lands were not in fact classified as mineral) were "claims" preventing the grant from attaching; *Northern Pacific Railway Company vs. Sanders*, 166 U. S. 620. In *Northern Pacific Railway Company vs. Musser-Sauntry Company*, 168 U. S. 604, a withdrawal by the Department for the purpose of satisfying another grant was held to have the same effect. Similarly *Nelson vs. Northern Pacific Railway Co.*, 188 U. S. 108, and *Northern Pacific Railway Co. vs. Trodick*, 221 U. S. 208, held that not even a claim of record was necessary, if (the land being unsurveyed,) there was actual possession with bona fide intention to enter after survey.

See also *Northern Pacific Railway Co. vs. Wismer*, 230 Fed. 591, holding that the setting aside of certain lands by representatives of the Department to satisfy an agreement with the Spokane Indians removed the lands from those to which the grant attached.

The settled practice of the Land Department has been to treat as excluded from the grant all lands to which any claim existed at the time of definite location.

*N. P. Rd. Co. vs. Evans*, 7 Land Dec. 131.

*N. P. Rd. Co. vs. Bowman*, 7 Land Dec. 238.

*N. P. Rd. Co. vs. Potter*, 11 Land Dec. 531.

*Chicago, Milwaukee & St. Paul Railway Co. vs. U. S.*, 218 U. S. 233, which considers the effect upon the grant to the McGregor and Western Railroad Company of a swamp land claim of the State of Iowa is distinguishable because of the difference in the language of the granting acts. The grant to the McGregor and Western Company excluded from its operation "all lands heretofore reserved to the United States by competent authority," whereas the Northern Pacific grant included only lands which were free from "preemption or other claims or rights."

It is clear that any claim made in good faith and undisposed of by the Land Department at the time of definite location excepted the lands from the grant of July 2, 1864. Under the cases cited the selection list of the State of Oregon not yet

passed upon by the Land Department when the railroad was definitely located was such a claim, so that the lands in dispute did not pass to the Northern Pacific Company when it filed its map of definite location on June 29, 1883.

The decision of the Oregon Supreme Court conceded that the State's claim had the effect of excluding the lands from those granted to the Railroad Company. (Record, p. 92.) Nevertheless the court held that the possession by respondent's grantor for the period provided by the State statute entitled respondent to the lands (excluding the two tracts which were never patented) because, as it was said, the lands were in fact patented to the Railroad Company; and the legal title having been conveyed thereby that title could be defeated and was defeated by the adverse occupancy of the lands. The court said in its opinion on application for rehearing (Record, p. 108) :

"When the patents were thus issued the United States thereby made a primary disposal of the soil, and the title so transferred to the company made it no more immune from attack in the State courts than if such conveyance had been executed by a private party. No error was committed in determining that as to all the real property so patented the company held only the naked legal title, which was defeated by the adverse holding of the plaintiff and his grantors."



The reconveyances by the Railway Company to the United States were held not to have affected the situation because the record did not show an acceptance by the United States of the deeds of reconveyance. (Record, p. 108.)

The plain error of this decision is its assumption that the lands were patented to the Northern Pacific Railroad Company prior to the time of the adverse possession, and that during the statutory period when respondent's grantors were occupying the land the legal title was in the Railroad Company. In point of fact the possession relied on began prior to 1892 and the patents were issued one in 1906, one in 1907, and one in 1909; in each instance less than ten years (the statutory period in Oregon) prior to the beginning of this suit. (Record, p. 33.)

If lands patented in error are no longer public lands and are possible of acquisition from the time of the patent by innocent purchasers (*U. S. vs. Winona & St. Peter R. Co.*, 165 U. S. 463), no retroactive effect can be given the patents and undeniably the lands remained public lands up to the time of the patent.

On the face of the record the legal title to the patented tracts was never in the Railway Company or its predecessor, Northern Pacific Railroad Company, sufficiently long to enable respondent or its grantors to defeat it by adverse possession. At the time of the possession upon which respondent's

case is founded—from 1892 to 1902—(Record, p. 32) the lands were unpatented public lands excluded from the operation of the railway grant because of the swamp claim of the State; and no legal title to any of the tracts was conveyed to the Railway Company by the United States until the year 1906. (Record, p. 33.) This suit was commenced September 25, 1912. (Record, p. 49.)

This decision, therefore, recognizes and affirms alleged rights based solely on the possession for the period provided by State law, of public lands; and if not set aside its effect will be to deny the rights now being asserted by petitioners in the Land Department to obtain the land under the mineral indemnity clause of the Act of July 2, 1864.

Except as to the one tract which has been repatented to the Railway Company upon its mineral indemnity selection, petitioners do not seek affirmative relief in this suit: the claim of the Railway Company to the lands (with the one exception) being *sub judice* in the Land Department. The basis of its claim to all the lands, however, is the same; treating the lands as public lands it filed with the Land Department the mineral indemnity selections authorized by the granting act.

In its first opinion the Supreme Court of Oregon held that these mineral indemnity selections of the Railway Company were ineffectual and that

selections to take the place of lands lost to the grant because mineral in character could be made only within the ten mile limit beyond the place limits. (Record, p. 89.) Upon an application for rehearing (Record, p. 97) which explained that this question was not before the court but was *sub judice* in the Land Department a different basis was assigned by the State Supreme Court for affirmance of the decree in favor of respondent. (Record, p. 106.)

The question of whether or not the Railway Company's indemnity selections have been made properly is perhaps not open to discussion here. It is proper to say, however, that the opinion of the Oregon Supreme Court limiting the mineral indemnity selection right given by the granting act to the ten mile deficiency limits is contrary to the settled construction of the Act by the Land Department. See opinions Attorney General Wickersham, 41 Land Dec. 571, and Assistant Attorney General Cobb, 41 Land Dec. 576, and unreported decision of Secretary of Interior September 18, 1913, in the case of *Margaret T. Souders vs. Northern Pacific Railway Company*.

The final decision of the Supreme Court of Oregon in this case awards the land in dispute to respondent notwithstanding the fact that the land was public land and not subject to rights based

upon the possession of his grantors. The decision denies to petitioners the rights given by the Act of July 2, 1864; it defeats the title to the northeast quarter of the southwest quarter of Section 7, Township 5 North of Range 30 East, which title is based upon patent issued May 25, 1914, upon mineral indemnity selection made under authority of the mineral indemnity clause of the granting act. The decision further denies the right of petitioners to secure the two tracts (Lot 2, Section 5, and north half of northwest quarter, or lots 1 and 2, of Section 7, Township 5 North of Range 30 East) which right is now being asserted through selection lists pending in the Land Department under the authority of the mineral indemnity clause of the granting act.

Clearly, therefore, the decision of the Oregon Supreme Court is erroneous and if unreversed it will deny to petitioners rights given by an Act of Congress, to-wit: the Act of July 2, 1864.

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